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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1991

SAMUEL E. WALLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does 28 U.S.C. § 455(a), which requires a judge to disqualify himself in any proceeding in which his partiality might reasonably be questioned, require that the cause of the apparent partiality or bias stem from an extrajudicial source?

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Petitioner Samuel E. Waller prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on December 19, 1991, which affirmed the order of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. It is reproduced as Appendix A, infra. On January 23, 1992, the Court of Appeals granted Petitioner's motion to stay the mandate pending disposition of his petition for writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

28 U.S.C. §455(a) provides in relevant part:

> Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

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STATEMENT OF THE CASE

The superseding indictment in this criminal case charged Petitioner and his stepfather, Gentry E. McKinney, with one count of conspiracy and sixty-one counts of "structuring" currency transactions to evade financial institution reporting requirements. See 18 U.S.C. § 371; 31 U.S.C. §§ 5313(a), 5322, 5324(3).

In January 1988 Mr. McKinney was an owner and manager of the Riverside Inn, a small resort located in Grants Pass, Oregon. Petitioner worked for McKinney, performing a variety of tasks including making bank deposits for McKinney and the Riverside Inn. Petitioner did not himself put the deposits together or otherwise determine how much to deposit. This was done by Mr. McKinney and bookkeepers at the Riverside Inn.

Petitioner was at all times acting under the direction and control of Mr. McKinney. During the period of January 12, 1988, through April 25, 1988, Petitioner and Mr. McKinney deposited a total of $1,975,201.41 into fourteen bank accounts. Of that amount, Petitioner deposited $448,817 in currency into accounts of Mr. McKinney and McKinney's businesses and into Petitioner's own account.

The government's theory was that Mr. McKinney was adding additional cash to the deposits for the Riverside Inn and was structuring the deposits so as not to trigger the filing of a currency transaction report ("CTR").[1] The

[1] By law, banks and other domestic financial institutions are required to complete CTRs on currency transactions exceeding $10,000. See 31 U.S.C. § 5313; 31 C.F.R. 103.22(a). A CTR is also known as IRS Form 4789.

government asserted that Petitioner assisted McKinney in making the cash deposits.

Petitioner and his stepfather, Mr. McKinney, were tried separately. Mr. McKinney had a jury trial in September 1989 and was convicted on all counts. He was sentenced on December 18, 1989. The Honorable James A. Redden, United States District Judge, District of Oregon, presided at the McKinney trial and imposed the sentence.

Petitioner's trial was severed from the McKinney trial on the agreement that Petitioner would waive a jury trial and proceed with a non-jury or bench trial before Judge Redden. Petitioner did formally waive a jury trial on October

12, 1989. His bench trial took place on April 13, 1990. Judge Redden found Petitioner guilty by written order dated June 28, 1990. Petitioner was sentenced by Judge Redden on January 7, 1991.

Prior to the January 7, 1991, sentencing, Petitioner received a copy of the Presentence Investigation Report ("PSR") prepared by the United States Probation Office. Attached to the PSR was a memorandum to the probation officer written by the government case agent, Internal Revenue Service Special Agent Roger Wirth ("Wirth Memorandum"). The Wirth Memorandum was dated October 24, 1989.

The Wirth Memorandum contained a great deal of prejudicial information and allegations about Petitioner. The Wirth Memorandum was offered to show

that Petitioner knew or reasonably should have known that the currency involved in the "structuring" transactions was "criminally derived property." This question bears on the application of the sentencing guidelines to a conviction under 31 U.S.C. § 5324(3). See United States Sentencing Guidelines ("U.S.S.G."), §§ 2S1.3(a)(1)(C) and (b)(1).[2]

The Wirth Memorandum claimed that Petitioner was tied to international drug smugglers who provided much of the currency deposited by him and his stepfather. Because a conviction for "structuring" under 31 U.S.C. § 5313 and

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[2] At sentencing the district court found that Petitioner did not in fact know that the currency was criminally derived, but did find that Petitioner should have known that it was criminally derived.

5324(3) does not require proof that the currency was from an illegal source, or knowledge of an illegal source,[3] the Wirth Memorandum disclosed to Petitioner for the first time the full scope of criminal activity in which the government suspected he and Mr. McKinney were involved.

Subsequent investigation disclosed that the Wirth Memorandum was utilized in connection with the prior sentencing of Mr. McKinney. Consequently, Petitioner learned that Judge Redden had received and read the Wirth Memorandum, with all its prejudicial allegations about Petitioner, prior to the time he

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[3] In contrast, 18 U.S.C. §§ 1956 and 1957 would require the government to prove that the currency was derived from an illegal source and that the defendant had knowledge that it was criminally derived.

presided as judge and jury at Petitioner's bench trial. Neither the government nor Judge Redden ever disclosed to Petitioner prior to his bench trial the existence of the Wirth Memorandum or the fact that Judge Redden had received it prior to the trial.

Prior to his scheduled sentencing, Petitioner filed a Motion for a New Trial. Petitioner asserted, inter alia, that Judge Redden should have disqualified himself from Petitioner's bench trial pursuant to 28 U.S.C. §455(a) because of the appearance of bias and partiality created by his prior receipt of the Wirth Memorandum and failure to disclose its existence to Petitioner prior to the bench trial.

At a hearing on November 5, 1990, Judge Redden stated that, although he

did not believe he was in fact biased against Petitioner because of the Wirth Memorandum, he did agree that the appearance of bias existed and was "aggravated" by the fact that Petitioner had proceeded with a bench trial. Transcript of Motions Hearing, November 5, 1990, at 39. Judge Redden indicated he believed that Petitioner would have been entitled to know that he had seen the Wirth Memorandum and what it said in deciding to waive a jury trial. Id.

Judge Redden denied Petitioner's Motion for a New Trial. He held that recusal was not required under 28 U.S.C. §455(a) because the prejudicial information about Petitioner (the Wirth Memorandum) was not received from an extrajudicial source, i.e., a source

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independent of the prosecution of Petitioner and Mr. McKinney.

On appeal, the Ninth Circuit held that "Information obtained by a judge through judicial duties in relation to one co-defendant. . .cannot serve to disqualify that judge from the subsequent trial of another co-defendant." App. at A-4 (citations omitted). In other words, the Court of Appeals adhered to the extrajudicial source requirement and held that the appearance of bias did not require Judge Redden to disqualify himself under § 455(a) because it was not derived from a source independent of the prosecution of Petitioner and Mr. McKinney.

REASON FOR GRANTING THE WRIT

This Court should grant the writ because there is a conflict between the

Ninth Circuit and the First Circuit on the question of whether an extrajudicial source requirement applies to disqualification under § 455(a). To understand what the conflict involves, the Court must review the disqualification statute, 28 U.S.C. § 455. This statute provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

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The courts apply different standards of proof to subsections (a) and (b) in determining whether disqualification under § 455 is required.

Section 455(a) requires disqualification in any proceeding in which the judge's impartiality "might reasonably be questioned." In the Ninth Circuit, the test for disqualification under this subsection is,

> [W]hether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly either because of the appearance or the fact of bias or prejudice.

United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). This standard is an objective standard requiring disqualification "if there is a

reasonable factual basis for doubting the judge's impartiality." Id., quoting, H. Rep. No. 1453, 93rd Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News 6351, 6354.

On the other hand, disqualification under § 455(b) is not based on an objective standard but requires a showing of actual bias in fact. On this point the circuits seem to be in agreement. See United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990), and United States v. Conforte, 457 F.Supp. 641, 657 (D. Nev. 1978), aff'd 624 F.2d 869 (9th Cir), cert. denied, 449 U.S. 1012 (1980). Also, the courts are in agreement that the "bias in fact" standard of § 455(b) requires that the source of bias be extrajudicial. See Id.

The conflict is whether disqualification under the objective standard of § 455(a) must be predicated on an extrajudicial source. In the First Circuit the answer to this question is a resounding "No." In Chantal, the First Circuit addressed this question head-on and affirmed its earlier decisions, holding that "[T]he source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." 902 F.2d at 1022. The position of the First Circuit is based on its interpretation of legislative revisions to § 455 that were enacted in 1974. See Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609. Prior to this amendment, § 455 required disqualification if the judge "in his

opinion" deemed it improper to sit in a particular case. The court in Chantal noted the legislative shift from a subjective standard to an objective one.

> We recognize that the newly amended recusal provision, 28 U.S.C. § 455(a), now permits disqualification of judges even if alleged prejudice is a result of judicially acquired information in contradistinction to the prior law that required a judge to hear a case unless he had developed preconceptions by means of extrajudicial sources.

Chantal, 902 F.2d at 1022, quoting, United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) (emphasis in original).

The Chantal court acknowledged its conflict with the Ninth and Fifth Circuits. 902 F.2d at 1021-1022. It aligned itself with decisions of the Sixth Circuit. Id. at 1024. See

Roberts v. Bailar, 625 F.2d 125, 127-129 (6th Cir. 1980).

The Ninth Circuit panel below was presented with the First Circuit authorities cited above and expressly declined to follow them. Rather, the panel stated that, "Information obtained by a judge through judicial duties in relation to one co-defendant, however, cannot serve to disqualify that judge from the subsequent trial of another co-defendant." App. A-4. The court's adherence to the extrajudicial source rule was grounded in earlier decisions of the Ninth Circuit. See United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989), and United States v. Winston, 613 F.2d 221, 223 (9th Cir. 1980). As regards the conflicting First Circuit

position set forth in Chantal, the Ninth Circuit panel stated only, "We have not followed the First Circuit's position on this issue." App. at A-5.

The Ninth Circuit's position has been criticized by the commentators who agree with the First Circuit that a rigid test based on the source of alleged bias is not consistent with the 1974 amendment of § 455, wherein the subjective standard was abandoned in favor of an objective one. It has been suggested that the real focus should remain fixed on whether a reasonable person would question the judge's impartiality, regardless of the source of the alleged bias. See, Comment, Questioning the Impartiality of Judges: Disqualifying Federal District Court

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Judges Under 28 U.S.C. § 455(a), Temple L.Q. 697, 717 (1986).

Because of the conflict between the Courts of Appeals on the applicability of the extrajudicial source requirement to disqualification under § 455(a), this case merits review by this Court.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED this 19th day of February, 1992.

Respectfully submitted,

NORMAN SEPENUK, P.C.

_____

Norman Sepenuk
Douglas Stringer
Of Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAMUEL WALLER, Defendant-Appellant.	NO. 91-30041 DC NO. CR-89-60021-2-JAR MEMORANDUM* F I L E D 12/19/91 Clerk, U.S. Court of Appeals

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted November 4, 1991
Portland, Oregon

BEFORE: TANG, O'SCANNLAIN, and RYMER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Samuel Waller was found guilty of structuring approximately $500,000 in currency deposits with various banks in Oregon, in individual deposit amounts of less than $10,000, so as to avoid federal currency transaction report (CTR) requirements. 31 U.S.C. § 5513(a), 5322, and 5324(3). Waller appeals the district court's denial of his motion for a new trial. He argues that Judge Redden should have recused himself after reviewing an FBI report (the Wirth Memorandum) appended to co-defendant Gentry McKinney's presentence report, which contained information about drug trafficking that implicated Waller as well as McKinney. Waller also claims that his waiver of a jury trial was not "knowing and intelligent" because he did not know the judge was

familiar with the Wirth Memorandum. Waller additionally argues that his rights under Miranda v. Arizona, 384 U.S. 436, 478-79 (1966), were violated when a prosecution witness testified about Waller's demeanor during a custodial interrogation. Finally, Waller contends that U.S.S.G. § 2S1.3(a)(1)(C)[1] is an unconstitutionally vague guideline and, in any event, was applied erroneously in his case. We affirm.

I.

The denial of a motion for a new trial is reviewed for abuse of discretion, United States v. Steel, 759 F.2d 706, 713 (9th Cir. 1985), as is

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[1] Waller was sentenced in January 1991 and thus the district court applied U.S.S.G. § 2S1.3(a)(1)(C) as it appears in the November 1990 Guidelines Manual.

Judge Redden's refusal to recuse himself. United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989). Waller argues that Judge Redden's review of the FBI report during the McKinney sentencing process compromised the appearance of impartiality during Waller's subsequent bench trial. Information obtained by a judge through judicial duties in relation to one co-defendant, however, cannot serve to disqualify that judge from the subsequent trial of another co-defendant. See Id.; United States v. Winston, 613 F.2d 221, 223 ((9th Cir. 1980). Waller relies on a First Circuit opinion, United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990), to support his contention that an impermissible

appearance of judicial bias can originate even when a judge is performing judicial duties. We have not followed the First Circuit's position on this issue.

Our adherence to Monaco is supported by the fact that, as Judge Redden noted in his written order denying the motion for a new trial, he read the FBI report more than five months prior to Waller's bench trial and had by that time already forgotten its significance and specific allegations. Furthermore, judges are presumed to have ignored inadmissible evidence when deciding a case. Harris v. Rivera, 454 U.S. 339, 346 (1981) (per curiam). This presumption applies with equal force when a judge reviews a report during the sentencing process in one case that

would be inadmissible in another case over which he subsequently presides. Finally, because all parties agreed that evidence in McKinney's trial could be considered in Waller's trial, and were aware that Judge Redden would have access to all information proffered in the McKinney proceedings, the Wirth Memorandum submitted in connection with McKinney's sentence was not an ex parte communication that the judge should not have seen. Cf. United States v. Van Griffin, 874 F.2d 634, 637 ((9th Cir. 1989) (magistrate had police report about defendant he should not have had).

Given these facts, we see no reasonable grounds for questioning Judge Redden's impartiality because of bias or prejudice. See United States v. Conforte, 624 F.2d 869, 881 (9th Cir.),

cert. denied, 449 U.S. 1012 (1980). Accordingly, Judge Redden did not abuse his discretion by declining to recuse himself, or by denying the motion for new trial.

II.

Waller's other ground for seeking a new trial is based upon a claim that his jury waiver was invalid. Waller waived his right to a jury on two occasions: once in June 1989 when the parties stipulated that Waller's bench trial would follow McKinney's jury trial, and that evidence in the McKinney trial could be considered in Waller's; and again in April 1990 immediately before the start of Waller's trial. He argues that the judge failed to make the kind of disclosure required for an intelligent waiver, and that the

disclosure fell short of what Conforte condoned.

No problem arises from the original waiver because the Wirth Memorandum had not yet surfaced. So far as the second waiver is concerned, it was well within Judge Redden's discretion to find that there was no information of which he was then aware that should have been disclosed. See Conforte, 624 F.2d at 881-82. Waller knew that Judge Redden would know whatever came up during the McKinney trial. Having attended that trial, Waller knew that the government had proffered evidence that a narcotics sniffing dog had reacted positively to currency deposited by McKinney. Even though that evidence was excluded from McKinney's jury trial, Judge Redden obviously knew about it, and Waller knew

Judge Redden knew about it. Similarly, Waller knew that the government's theory was that drug trafficking was the source of the funds he and McKinney deposited. He had been asked about drug trafficking shortly after his arrest, and during discovery the government provided Waller with alleged drug records found in his car. These records were the subject of a motion in limine and he therefore knew that Judge Redden was aware of the government's belief that Waller was involved in dealing drugs. While the Wirth Memorandum may have been more detailed, even had Judge Redden recalled it, it did not refer to any subject not already touched upon. Waller, therefore, was sufficiently informed of Judge Redden's knowledge of his

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involvement with drugs that his waiver was knowing and intelligent.

Under the circumstances of this case, it was unnecessary for the trial judge to go further, as Waller urges he should have, and specifically warn him that a juror with Judge Redden's knowledge would be disqualified. We conclude the waiver was valid, and that the district court did not abuse its discretion in denying Waller's motion for a new trial.

III.

Whether Agent Bruckner's testimony violated Waller's Fifth Amendment Miranda rights presents a question of law reviewed de novo. See United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987). Waller claims Bruckner's testimony violates the rule that the

prosecution may not comment on a defendant's silence after he has been informed of his right to remain silent. See Wainwright v. Greenfield, 474 U.S. 284, 290-91 (1986); Doyle v. Ohio, 426 U.S. 610, 617-18 (1976). Unlike those two cases, however, Waller was not, in fact, silent after receiving his Miranda warnings. He responded to Agent Bruckner's custodial questioning. Waller's Fifth Amendment right to remain silent, therefore, was not violated. Cf. Anderson v. Charles, 447 U.S. 404, 408-09 (1980).

IV.

Waller contends that U.S.S.G. § 2S1.3(a)(1)(C) is unconstitutionally vague because it provides a sentence enhancement for individuals who "reasonably should have believed that

the funds were criminally derived property." Assuming that sentencing guidelines can be challenged on their face as unconstitutionally vague, we do not think § 2S1.3(a)(1)(C) violates due process. In United States v. Helmy, No. 89-10659, slip op. 14657, 14665-66 (9th Cir. Oct. 28, 1991), we indicated that a guideline satisfies due process if it "provide[s] explicit standards for those who apply it[,] to prevent arbitrary and discriminatory enforcement." Id. at 14666 (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982)).

The reasonable person standard found in § 2S1.3(a)(1)(C) means that judges may not apply that section's upward enhancement arbitrarily and discriminatorily--they must first make

an objective determination that the defendant should have known the property was criminally derived property. Because judges are capable of making a reasoned judgment that an individual in a particular case should know when a horde of cash is criminally derived property, we conclude that § 2S1.3(a)(1)(C) does not authorize arbitrary sentence enhancements, and thus does not offend due process.

Finally, Waller contends there is insufficient evidence in the record to support the conclusion that he reasonably should have known that the cash he deposited was criminally derived property. Waller's claim fails. First, the sheer volume of cash he handled in a three-month period undoubtedly would have led a reasonable person to consider

it criminally derived property. Second, testimony from Agent Bruckner suggested that Waller was aware the money had been obtained from drug sales. Finally, Waller's counsel once again brought the drug allegations raised in the Wirth Memorandum to the district court's attention prior to Waller's sentencing.[2] That memcrandum also suggests Waller knew the cash had been obtained through drug trafficking.

AFFIRMED.

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[2] Waller's counsel wrote a letter to Judge Redden prior to his sentencing that attempted to rebut the Wirth Memorandum's allegations.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR A WRIT OF CERTIORARI on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

James L. Sutherland
Assistant U. S. Attorney
701 High Street
Eugene, Oregon 97401-2713

and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this 19th day of February, 1992.

Norman Sepenuk
Of Attorneys for Petitioner